86 - 1347

No.

In The
Supreme Court of the United States
October Term, 1986

SHELL OIL COMPANY, a Delaware corporation,
Petitioner,

v.

PIAMCO, INC., an Illinois corporation,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Whether this Court should exercise its power of supervision where the Seventh Circuit Court of Appeals refuses to employ a well established rule of contract construction for the sole, discriminating reason that:

> . . . Shell is hardly a party that needs our special protection. Shell is one of the world's leading energy producers. Surely, Shell is a sophisticated enough consumer of energy related services to protect itself against an ambiguous contract.

2. Whether the Seventh Circuit Court of Appeals' decision that runs contrary to all of the other reported decisions on the question of what constitutes an "overriding royalty" so distorts the doctrine of *stare decisis* as to call for the exercise of this Court's supervisory authority.

LIST OF PARTIES

The parties to the proceedings below were the petitioner Shell Oil Company* and the respondent Piamco, Inc.

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*Pursuant to Supreme Court Rule 28.1, Shell Oil Company is a Delaware corporation 100% of the stock of which is owned by SPNV Holdings Inc., a Delaware corporation. 100% of the stock of SPNV Holdings Inc. is owned by Shell Petroleum N.V., a Netherlands corporation, 60% of the stock of which is owned by N. V. Koninklijke Nederlandsche Petroleum Maatschappij, a Netherlands corporation, and 40% of the stock of which is owned by The "Shell" Transport and Trading Company, P.L.C., a United Kingdom corporation.

Shell Oil Company owns an interest in the following companies (other than wholly owned subsidiaries):

Pecten Middle East Services Company, Fractionation Research, Inc., Heat Transfer Research, Inc., Inland Corporation, Loop, Inc., Lucky Chance Mining Company, Inc., The New Paraho Corporation, MESBIC Financial Corporation of Houston, NCUBE, Oil Company's Institute for Marine Pollution Compensation Ltd., Oil Insurance Ltd., Seadock, Inc., Pecten Cameroon Company, Pecten Portugal Company S.A.R.L., Thums Longbeach Company, East Texas Salt Water Disposal Company, Grande Ecallie Land Company, Inc., Van Salt Water Disposal Company, Wyoming Industrial Development Corporation, Cortez Capital Corporation, George Newman & Company, Oil Company's Institute for Marine Pollution Compensation Ltd., Butte Pipe Line Company, Dixie Pipeline Company, Explorer Pipeline Company, LOCAP, Inc., Olympic Pipe Line Company, Plantation Pipe Line Company, West Shore Pipe Line Company, Wolverine Pipe Line Company, Huntsman Chemical Corporation, Morrison Molded Fiber Glass Company, Quazite Corporation, Xerkon, Inc., Massey Coal Company, A. T. Massey Coal Company, Inc.

In addition the Royal Dutch/Shell Group of companies owns a number of companies in various countries including a majority interest in Shell Canada, Limited (which is the only one of those companies which, to Petitioner's knowledge, has stock which is publicly traded in the United States).

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Other Authorities:

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PIAMCO, INC., an Illinois corporation,
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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

The petitioner Shell Oil Company respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit, entered in the above entitled proceedings on July 29, 1986, and amended September 11, 1986.

OPINIONS BELOW

The Amended Opinion of the Court of Appeals for the Seventh Circuit, Case Nos. 85-2251 and 85-3207, consolidated, entered September 11, 1986, is reprinted in the appendix hereto. (Appendix (hereinafter, "App.") 1a).

The June 25, 1985 judgment of the United States District Court for the Northern District of Illinois, Eastern Division (Getzendanner, D.J.), Case No. 84 C 2569, is set forth in the appendix hereto. (App. 14a).

JURISDICTION

The judgment of the Court of Appeals was entered on July 29, 1986. (App. 8a). On September 11, 1986, the Court of Appeals entered an amended opinion on its own motion. (App. 1a). A timely petition for rehearing in banc was denied on January 14, 1987. (App. 20a). The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATEMENT OF THE CASE

Shell Oil Company ("Shell") and Piamco, Inc. ("Piamco") entered into a "Coal Reserve and Royalty Agreement" dated October 24, 1974 ("Agreement"), which is reprinted in its relevant parts in the appendix hereto. (App. 28a). Piamco drafted the Agreement. Pursuant to the terms of the Agreement, Piamco was to acquire leases from landowners for coal rights in certain acreage, and then transfer those leases to Shell. Shell made an initial payment to Piamco for the transfer of the coal leases. Of particular significance here, by the terms of the Agreement, Piamco reserved to itself certain overriding royalty interests in the leased acreage, which included "earned royalties" of $00.05 per ton of mined coal, and "advance and minimum" royalties of $4.00 per acre per year. Earned royalties were to be reduced by credits for all "advance and minimum" royalties paid. (Agreement, Articles II and III; App. 35a-37a.)

Piamco acquired and transferred to Shell leases covering 107,740 acres. On January 30, 1984, Shell released its rights to 42,845 acres by terminating the underlying leases, pursuant to §7.02 of the Agreement. (App. 39a).

The sole issue in the district court was whether Shell had any obligation to pay to Piamco the overriding "advance and minimum" royalties on the acreage which was subject to the terminated leases. Jurisdiction in the district court was invoked pursuant to 28 U.S.C. §1332, based upon diversity of citizenship of the parties.

ARGUMENT

I. The Circuit Court's Refusal to Construe Ambiguity In A Contract Against Its Drafter Because the Other Party to the Contract Is A Leading Energy Producer Is So Discriminatory As to Warrant the Exercise of This Court's Supervisory Authority.

Shell's rights acquired under the Agreement on the leased acreage transferred to Shell by Piamco were con-

ditioned on payment by Shell to Piamco of "advance and minimum" royalties computed at $4.00 per acre per year. Shell at all times paid those royalties on all leased acreage retained by Shell. Only after Shell's release and termination of leases to 42,845 acres, and only with respect to that terminated acreage, did Shell stop paying "advance and minimum" royalties. Shell took that action because the "advance and minimum" royalties on the acres covered by the terminated leases, being overriding royalties, were terminated as a matter of law simultaneously with the termination of the subject leases.

The Agreement by its terms was silent as to the effect of lease termination on the continued validity of overriding royalties relating to that terminated acreage. In the event of such silence, the overriding royalties should have terminated simultaneously with the termination of the leases from which the royalties derived, as a matter of law, since they were terminable interests. Absent an express contractual provision to the contrary, an obligation to pay an overriding royalty cannot survive termination of the leasehold estate upon which that royalty depends. That is the holding of every Court of Appeals, and every other court, which has decided the issue.*

Therefore, the Agreement's silence on the effect of lease termination required the legal conclusion that the instant royalties terminated upon the termination of the re-

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* *Please see, Aven* v. *United States*, 78-2 U.S. Tax Cases §9729, p.85,450 (W.D.Okla. 1978); *Fain & McGaha* v. *Biesel*, 331 S.W.2d 346 (Tex.Civ.App. 1960); *Heman* v. *Jefferson*, 136 Ill.App.3d 745, 483 N.E.2d 537 (4th Dist. 1985); *Keegan* v. *Humble Oil & Refining Co.*, 155 F.2d 971 (5th Cir. 1946); *Keese* v. *Continental Pipe Line Co.*, 235 F.2d 386 (5th Cir. 1956); *La Laguna Ranch Co.* v. *Dodge*, 18 Cal.2d 132, 114 P.2d 351 (1941); *Meeker* v. *Ambassador Oil Co.*, 308 F.2d 875 (10th Cir. 1962); *Thornburgh* v. *Cole*, 207 P.2d 1096 (Okla. 1949); and *Frey* v. *United States*, 159 F.Supp. 436 (N.D.Tex. 1957).

lated leases. However, the most that the Court of Appeals could have held was that such contractual silence gave rise to an ambiguity. In the event that any possible ambiguity may have existed regarding termination of overriding royalty obligations, the Court of Appeals construed the contract, in the face of such ambiguity, in a manner entirely at variance with the standards of contract construction uniformly applied in other circuits.

The unrebutted record evidence on this issue is the affidavit of Shell's employee, Archie J. Rubbo. (App. 27a). Mr. Rubbo plainly stated therein that the subject Agreement was drafted by Piamco. Proper legal analysis thus requires that, in the event any ambiguity were to be found, the contract ambiguity should have been construed against its drafter, Piamco, and in favor of Shell.

The law on this proposition in other Circuits is clear. Any ambiguity in a contract is to be construed against the party which drafted the contract. The Fifth Circuit stated in *C. A. May Marine Supply Co. v. Brunswick Corp.*, 557 F.2d 1163, 1165 (5th Cir. 1977), " . . . it is a cardinal rule of construction that ambiguous terms of a contract are to be interpreted against the party which drafted them, [citation omitted] . . . " To the same effect are the decisions of the Second Circuit in *Stern v. Satra Corp.*, 539 F.2d 1305, 1310 (2nd Cir. 1976); the Third Circuit in *First Nat. State Bank of N.J. v. Com., Etc.*, 610 F.2d 164, 170 (3d Cir. 1979); the Sixth Circuit in *Boatland, Inc. v. Brunswick Corp.*, 558 F.2d 818, 822 (6th Cir. 1977); the Eighth Circuit in *Truelsen v. European Health Spa of Nebraska, Inc.*, 561 F.2d 169, 170 (8th Cir. 1977); and the Ninth Circuit in *United States f/u/b/o Union Building Materials Corp. v. Haas & Haynie Corp.*, 577 F.2d 568, 574 (9th Cir. 1978). Nevertheless, the Seventh Circuit, in the face of this overwhelming authority, construed the Agreement against Shell and in favor of Piamco, the author.

Without benefit of authority, as the reason for its

refusal to follow the applicable law in construing the contract against Piamco, the Circuit Court candidly stated in its opinion that even if the Agreement contained any ambiguity, the standard rule of contract construction is unavailable to Shell and other "leading energy producers". Writing for the Court, Judge Swygert stated (see App. 5a):

> . . . Shell is hardly a party that needs our special protection. Shell is one of the world's leading energy producers. Surely, Shell is a sophisticated enough consumer of energy related services to protect itself against an ambiguous contract.

The rationale for depriving Shell of this very important rule of construction was necessary inasmuch as the only evidence in the record as to who drafted the contract was the Rubbo affidavit. Although Judge Swygert is to be congratulated on his candor, it is more than a little surprising that the Judge would employ one set of construction rules for "leading energy producers" and another for everyone else. This result is all the more shocking because the matter of whether Shell was or was not a leading energy producer was not a part of the record below since it was completely irrelevant to the issues in this case.

This discriminatory treatment of Shell comes very close to being a violation of its constitutional rights.

"There can be no equal justice where the kind of trial a man gets depends on the amount of money he has." *Griffin v. Illinois*, 351 U.S. 12, 19, 76 S.Ct. 585, 100 L.Ed. 891, 899 (1956). Justice Black's clear statement in that case plainly applies to rich and poor alike. "Providing equal justice for poor and rich, weak and powerful alike is an age-old problem." *Griffin v. Illinois, supra*, 351 U.S. at 16. The obvious failure (or, worse, refusal) to provide such equal justice to Shell, whether it is an express violation of Shell's constitutional rights of due process and equal protection, nevertheless cuts at the very heart of our system of justice, so that this Court should review the case in order to exercise its supervisory authority.

II. The Circuit Court's Decision to Enforce Terminated Overriding Royalties So Distorts the Doctrine of *Stare Decisis* As to Necessitate the Exercise of This Court's Supervisory Authority.

As previously noted, the subject "advance and minimum" royalties unquestionably were "overriding" royalties, and as such depended upon the continued valid existence of the leases from which they derived. As has already been demonstrated, the authorities universally provide that any "overriding" royalty comes to an end coterminously with the termination of the lease upon which it depends. Shell properly terminated the subject leases. The Agreement's silence as to the effect of termination of leases on the subject "overriding royalties" was fitting, since the termination of the "overriding" royalty at the time of termination of the underlying lease occurs as a matter of law and does not require any express contractual statement to achieve that result. The opposite conclusion below threatens the integrity of fundamental principles of mineral contract law, contrary to the doctrine of *stare decisis*.

Nor is there any basis to speculate that the royalty obligations should continue due to any duty on Shell to develop the premises. Shell had no such obligation either to commence or to continue operation of any mining activities on any leased properties. Virtually all jurisdictions apply the "prudent operator" standard *(see, e.g.*, Hemingway, *Oil & Gas 2d*, §8.3, p. 414) which provides that any duty to develop goes only to the extent "reasonably expected of operators of ordinary prudence, having regard to the interests of both lessor and lessee..." *(Brewster* v. *Lanyon Zinc Co.*, 140 F. 801, 814 (8th Cir. 1905). *See* 5 Williams & Myers, *Law of Oil & Gas*, §806.3, pp.35, *et seq.*) The *Brewster* decision provided further that a lessee has no duty to perform any operations beyond a point profitable to him (140 F. at 814). Perhaps more importantly, if there is any

breach of some implied duty to develop, the remedy is forfeiture of the lease at issue. (*American Law of Mining*, 1st ed., §30.10, p.332, and §30.11, p.339.) It is obvious that Shell would not have terminated the underlying leases if it were economical to develop the mineral interests.

Please see also *Archer* v. *Mountain Fuel Supply Co.*, 102 Idaho 852, 642 P.2d 943 (1982), which is extremely analogous and demonstrates that Shell had no obligation to mine or develop *any* of the leased premises. Also instructive upon these same issues is *Orlandi* v. *Goodell*, 760 F.2d 78 (4th Cir. 1985).

The decision to compel Shell to continue to pay artificial royalties on abandoned acreage, with no prospect of ever recouping such payments through development and production, since the subject leases were terminated, flies in the face of consistent and overwhelming mineral law. It tears at the very fabric of the law and the doctrine of *stare decisis*, as well as the integrity of contracts and the ability of parties to rely upon the consistent law of contract construction when entering into contracts.

CONCLUSION

The overwhelming majority of courts have correctly held that "overriding royalties" are terminable upon the surrender of the underlying lease absent an express provision to the contrary. The Court of Appeals ignored this established precedent by its discriminatory application of a well established rule of contract construction.

For many years the courts have correctly held that there is a duty to develop mineral land only if it is economically feasible to do so. Imposing royalty payments when the mineral land is uneconomical to develop will have a serious effect on the law of mining. In addition, numerous mineral interest transactions effectuated prior to the Court of Appeals' opinion will now become questionable. These parties entered into their contracts relying upon the well developed case law that "overriding

royalties" are terminable upon the surrender of the underlying lease without an express contrary provision, and now face liabilities "created" by the Court of Appeals because the Court of Appeals was not interested in protecting a large energy producer. *Stare decisis* is critical to the law of contracts, and the instant result-oriented opinion does extreme violence to the law of mineral contracts.

If this case is not reviewed, there will be fewer parties willing to enter into mineral agreements because of the fixed nature of the obligation found by the Court of Appeals. The instant decision will also cause considerable concern to those holding "overriding royalties" since they cannot be terminated by surrender of the underlying leases. At a time when this country is seriously concerned about energy, this decision is manifestly counterproductive.

Accordingly, review on Writ of Certiorari is appropriate pursuant to Rule 17 (1) (a) of the Rules of Practice of the Supreme Court of the United States.

Respectfully submitted,

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February 13, 1987.

APPENDIX

EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

AMENDED

In the

United States Court of Appeals

For the Seventh Circuit

Nos. 85-2251, 85-3207

PIAMCO, INC., an Illinois corporation,

Plaintiff-Appellee,

v.

SHELL OIL COMPANY, a Delaware corporation,

Defendant-Appellant.

Appeals from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 84 C 2569—Susan Getzendanner, *Judge.*

ARGUED JUNE 11, 1986—DECIDED JULY 29, 1986
AMENDED SEPTEMBER 11, 1986

Before WOOD and COFFEY, *Circuit Judges*, and SWYGERT, *Senior Circuit Judge.*

SWYGERT, *Senior Circuit Judge.* Plaintiff-appellee Piamco, Inc. is in the business of assembling mineable coal properties by acquiring coal leases from land owners. By October 1974 Piamco had acquired coal mining rights to 5,228 coal-rich acres near the town of Elkhart, Illinois. On October 24, 1974 defendant-appellant Shell Oil Company and Piamco entered into a Coal Reserve and Royalty Agreement ("the Agreement"). Under the terms of the Agreement, Piamco agreed to sell and convey to Shell rights, title, and interest to its existing coal leases in the area. Article I, section 1.02 of the Agreement provides that the purchase price for these rights is $467,000, plus

advance and minimum royalties as provided in Article II and earned royalties as provided in Article III. Section 1.03 obligated Piamco to use its best efforts over the course of the next fifteen months ("the acquisition period") to acquire and assign to Shell at least 59,772 additional acres in the same general area ("the reserve"). Any additional acreage would also be transferred to Shell. Under section 1.04 Shell agreed to pay $9.00 per acre for administrative costs; the actual cost to Piamco of initial payments to landowners; and the actual costs incurred in making acquisitions. In addition Shell agreed to pay Piamco an advance and minimum royalty as provided in Article II, and earned royalties as provided in Article III. Article II provided in full:

> It is understood and agreed that Piamco reserves and retains and is entitled to advance and minimum royalties on rights acquired by Shell in the Reserve pursuant to Article I of this Agreement, at the rate of $4.00 per acre per year for a period of 15 years commencing on the last day of the month following the Acquisition Period. For leases transferred to Shell pursuant to the provisions of Section 1.03 after the Acquisition Period, advance and minimum royalties for such leases shall begin on the last day of the month following such transfer. The obligation of Shell to pay such royalties shall be subject to the provisions of Section 7.01 hereof.

Article III of the Agreement provided that Piamco would be paid an earned royalty of five cents per ton of coal mined, removed, and sold from the reserve. Article IV declared that the obligation to pay royalties "shall operate both as an obligation of Shell and as a covenant running with the land." Shell also agreed in Article IV that it would not divest itself of any of its rights to the reserve "except to a purchaser, assignee or transferee that is reasonably financially able to carry out its obligation to pay such advance and minimum and earned royalties." Article VII, section 7.01 provided that if Piamco failed to transfer at least 50,000 reserve acres within the acquisition period Shell could terminate all the

leases transferred and cease the payment of royalties. Finally, section 7.02 provided that:

> Shell shall have the right after the Acquisition Period to sell, assign, transfer or convey such leases subject to the provisions of Article IV. After the Acquisition Period Shell shall have the right to terminate any lease provided, however, that if Shell shall terminate all or substantially all of such leases it shall first offer to assign, transfer and convey the same to Piamco without cost to Piamco.

Unlike section 7.01, section 7.02 does not mention the termination of royalty payments.

After entering into the Agreement Piamco acquired and transferred rights to 107,740 acres located in the reserve. On January 30, 1984 Shell released its rights to 42,845 acres. Shell paid advance and minimum royalties only on the remaining 64,192 acres in the amount of $256,768. Piamco demanded and was refused payment on the remaining 42,845 acres.

On March 28, 1984 Piamco filed a two-count complaint against Shell in the United States District Court for the Northern District of Illinois. Count I sought a declaration that Shell was obligated to make royalty payments on the 42,845 acres Shell had released. Count II sought recovery of a $171,387 payment Shell had failed to make on January 31, 1984 and prejudgment interest on that amount. In August 1984 Piamco moved for judgment on the pleadings. On June 25, 1985 the district court granted the motion. At that time the district court reserved ruling on Piamco's request for prejudgment interest, stating that Piamco could move for an award of interest in supplemental proceedings within twenty days. On July 10, 1985 Piamco did indeed move for prejudgment interest. On July 18 Shell filed its notice of appeal. On September 9, 1985 the district court nevertheless awarded Piamco prejudgment interest. On November 18, 1985 the amount of the interest was set at $11,996.74. On December 20, 1985 Shell appealed that decision. Shell's two appeals have been consolidated.

I

On appeal Shell makes two basic arguments. On the merits of the contract claim Shell argues that section 7.02 of the Agreement authorized it to terminate any number of the leases at will and thus operated to relieve it of the duty to pay royalties on the portion of the released leases. On the prejudgment interest claim Shell argues that the filing of its first notice of appeal stripped the district court of jurisdiction to enter an order affecting this case. We turn first to the contract claim.

Shell advances three reasons as to why it should not be held to have breached the Agreement. First, Shell asserts that the advance and minimum royalties referred to in the Agreement are actually a form of "overriding royalty." Overriding royalties are common in the oil and gas industry and have been defined as ". . . a fractional interest in the gross production of oil and gas under a lease, in addition to the usual royalties paid to the lessor. . . ." *Meeker v. Ambassador Oil Co.*, 308 F.2d 875, 882 (10th Cir. 1962). "It is an interest carved out of the lessee's share of the oil and gas, ordinarily called the working interest, as distinguished from the owner's reserved royalty interest." *Id.* There can be no doubt that as a general matter overriding royalty obligations end with the termination of the estate from which the interests were carved, absent an express contractual provision to the contrary. But we believe that in this case Shell makes entirely too much out of a label. The district court seemed to agree that the royalty payments embodied in the Agreement could be classified as "overriding royalties." But the court went on to hold that the Agreement itself manifested a clear intention to bind Shell to make such royalty payments regardless of the fate of the underlying leases. We agree.

Article II of the Agreement expressly binds Shell to pay advance and minimum royalties for fifteen years subject only to the limitations of section 7.01. That section of the Agreement, however, only provides Shell with a remedy in the event of Piamco's failure to secure leases

to at least 50,000 acres. In addition, Article IV prohibits Shell from ridding itself of its rights except to a purchaser financially able to carry out Shell's obligations to pay advance, minimum, and earned royalties. Construed as a whole, the contract unambiguously manifests an intent to bind Shell to make advance and minimum royalty payments even if it later relinquished its rights to a part of the acreage. The advance and minimum royalty payments constitute a part of the purchase price of the rights and not a bonus dependent on Shell's exercise of the rights secured from Piamco.

Second, Shell asserts that section 7.02 of the Agreement is ambiguous in regard to Shell's obligation to continue to pay advance and minimum royalties upon termination of the unilateral underlying leases. Such ambiguity, Shell contends, must be construed against its drafter. *Advance Process Supply Co. v. Litton Industries Credit Corp.*, 745 F.2d 1076, 1079 (7th Cir. 1984). The affidavit of a Shell employee alleges that the Agreement was written by agents of Piamco. Assuming, *arguendo*, that the document was, in fact, drafted by Piamco we nevertheless do not believe it is legally ambiguous and that we must punish its drafter. When read in conjunction with the contract as a whole, section 7.02 is fully consistent with our view that Shell remained obligated to pay Piamco advance and minimum royalties. Moreover, assuming, *arguendo*, that the agreement contains some minor ambiguities Shell is hardly a party that needs our special protection. Shell is one of the world's leading energy producers. Surely, Shell is a sophisticated enough consumer of energy-related services to protect itself against an ambiguous contract.

Third, in the alternative, Shell argues that section 7.02, instead of being ambiguous, quite clearly permits the unilateral termination of its royalty obligations. At the risk of repeating ourselves, we believe the contract as a whole establishes the contrary. The judgment of the district court that Shell remained obligated to Piamco for advance and minimum royalty payments is affirmed.

II

Shell's argument regarding the awarding of prejudgment interest is based on *Asher v. Harrington*, 461 F.2d 890 (7th Cir. 1972), wherein is stated the general rule that the filing of an appeal vests exclusive jurisdiction in the court of appeals. The district court relied on *Terket v. Lund*, 623 F.2d 29 (7th Cir. 1980), in which this court held that the issue of entitlement to attorney's fees could be decided by the district court during the pendency of an appeal. In *Terket* we stated that the attorney's fee inquiry

> is not the sort of reconsideration of the merits which could lead to altering the substantive judgment or in any way interfere with the pending appeal. . . . Thus the policy against two courts treating the same issues concurrently does not require withdrawing the district court's power to decide attorney's fees motions while an appeal is pending.

623 F.2d at 34. In *Kaszuk v. Bakery & Confectionary Union*, 791 F.2d 548 (7th Cir. 1986), however, this court held that a decision of a district court that determines liability, but does not resolve the issue of prejudgment interest, is not appealable. Nevertheless, the district court's decision in this case to calculate prejudgment interest is not reversible error, nor is this court deprived of jurisdiction over the case. Under *Kaszuk* a judgment that does not fully specify interest is not a final order. The June 25, 1985 order of the district court granting judgment on the pleadings on the question of liability alone was, therefore, not a final order and not appealable. Consequently, Shell's first notice of appeal on July 18, 1985 did not affect the right of the district court to later calculate prejudgment interest. The district court's final disposition of the case occurred on November 18, 1985 when the amount of interest was fixed. Shell's July 18, 1985 notice of appeal, while premature, preserved its objection to the determination of liability. Shell's appeal from the December 20, 1985 order brought the entire case before

this court. We see no reason to alter the district court's calculation. The award of $11,996.74 in prejudgment interest is affirmed.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

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Article I, Section 1.02 of the Agreement provides that the purchase price for these rights is $467,000 plus advance and minimum royalties as provided in Article II; and earned royalties as provided in Article III. Section 1.03 obligated Piamco to use its best efforts over the course of the next fifteen months ("the acquisition period") to acquire and assign to Shell at least 59,772 additional acres in the same general area ("the reserve"). Any additional acreage would also be transferred to Shell. Under section 1.04 Shell agreed to pay $9.00 per acre for administrative costs; the actual cost to Piamco of initial payments to landowners; and the actual costs incurred in making acquisitions. In addition Shell agreed to pay Piamco an advance and minimum royalty as provided in Article II, and earned royalties as provided in Article III. Article II provided in full:

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Article III of the Agreement provided that Piamco would be paid an earned royalty of five cents per ton of coal mined, removed, and sold from the reserve. Article IV declares that the obligation to pay royalties "shall operate both as an obligation of Shell and as a covenant running with the land." Shell also agreed in Article IV that it would not divest itself of any of its rights to the reserve "except to a purchaser, assignee or transferee that is reasonably financially able to carry out its obligation to pay such advance and minimum and earned royalties." Article VII, section 7.01, provided that if Piamco failed to

transfer at least 50,000 reserve acres within the acquisition period Shell could terminate all the leases transferred and cease the payment of royalties. Finally, section 7.02 provided that:

> Shell shall have the right after the Acquisition Period to sell, assign, transfer or convey such leases subject to the provisions Article IV. After the Acquisition Period Shell shall have the right to terminate any lease provided, however, that if Shell shall terminate all or substantially all of such leases it shall first offer to assign, transfer and convey the same to Piamco without cost to Piamco.

Unlike section 7.01, section 7.02 does not mention the termination of royalty payments.

After entering into the Agreement Piamco acquired and transferred rights to 107,740 acres located in the reserve. On January 30, 1984 Shell released its rights to 42,845 acres. Shell paid advance and minimum royalties only on the remaining 64,192 acres in the amount of $256,768. Piamco demanded and was refused payment on the remaining 42,845 acres.

On March 28, 1984 Piamco filed a two-count complaint against Shell in the United States District Court for the Northern District of Illinois. Count I sought a declaration that Shell was obligated to make royalty payments on the 42,845 acres Shell had released. Count II sought recovery of a $171,387 payment Shell had failed to make on January 31, 1984 and prejudgment interest on that amount. In August 1984 Piamco moved for judgment on the pleadings. On June 25, 1985 the district court granted the motion. At that time the district court reserved ruling on Piamco's request for prejudgment interest stating that Piamco could move for an award of interest in supplemental proceedings within twenty days. On July 10, 1985 Piamco did indeed move for prejudgment interest. On July 18 Shell filed its notice of appeal. On September 9, 1985 the district court nevertheless awarded Piamco prejudgment interest. On November 18, 1985 the amount of the interest was set at $11,996.74. On December 20,

1985 Shell appealed that decision. Shell's two appeals have been consolidated.

I

On appeal Shell makes two basic arguments. On the merits of the contract claim Shell argues that section 7.02 of the Agreement authorized it to terminate any number of the leases at will and thus operated to relieve it of the duty to pay royalties on the portion of the released leases. On the prejudgment interest claim Shell argues that the filing of its first notice of appeal stripped the district court of jurisdiction to enter an order affecting this case. We turn first to the contract claim.

Shell advances three reasons as to why it should not be held to have breached the Agreement. First, Shell asserts that the advance and minimum royalties referred to in the Agreement are actually a form of "overriding royalty." Overriding royalties are common in the oil and gas industry and have been defined as ". . . a fractional interest in the gross production of oil and gas under a lease, in addition to the usual royalties paid to the lessor. . . ." *Meeker v. Ambassador Oil Co.*, 306 F.2d 875, 882 (10th Cir. 1962). "It is an interest carved out of the lessee's share of the oil and gas, ordinarily called the working interest, as distinguished from the owner's reserved royalty interest." *Id.* There can be no doubt that as a general matter overriding royalty obligations end with the termination of the estate from which the interests were carved, absent an express contractual provision to the contrary. But we believe that in this case Shell makes entirely too much out of a label. The district court seemed to agree that the royalty payments embodied in the Agreement could be classified as "overriding royalties." But the court went on to hold that the Agreement itself manifested a clear intention to bind Shell to make such royalty payments regardless of the fate of the underlying leases. We agree.

Article II of the Agreement expressly binds Shell to pay advance and minimum royalties for fifteen years sub-

ject only to the limitations of section 7.01. That section of the Agreement, however, only provides Shell with a remedy in the event of Piamco's failure to secure leases to at least 50,000 acres. In addition, Article IV prohibits Shell from ridding itself of its rights except to a purchaser financially able to carry out Shell's obligations to pay advance, minimum, and earned royalties. Construed as a whole, the contract unambiguously manifests an intent to bind Shell to make advance and minimum royalty payments even if it later relinquished its rights to a part of the acreage. The advance and minimum royalty payments constitute a part of the purchase price of the rights and not a bonus dependent on Shell's exercise of the rights secured from Piamco.

Second, Shell asserts that section 7.02 of the Agreement is ambiguous in regard to Shell's obligation to continue to pay advance and minimum royalties upon termination of the unilateral underlying leases. Such ambiguity, Shell contends, must be construed against its drafter. *Advance Process Supply Co. v. Litton Industries Credit Corp.*, 745 F.2d 1076, 1079 (7th Cir. 1984). The affidavit of a Shell employee alleges that the Agreement was written by agents of Piamco. Assuming, *arguendo*, that the document was, in fact, drafted by Piamco we nevertheless do not believe it is legally ambiguous and that we must punish its drafter. When read in conjunction with the contract as a whole section 7.02 is fully consistent with our view that Shell remained obligated to pay Piamco advance and minimum royalties. Moreover, assuming, *arguendo*, that the agreement contains some minor ambiguities Shell is hardly a party that needs our special protection. Shell is one of the world's leading energy producers. Surely, Shell is a sophisticated enough consumer of energy-related services to protect itself against an ambiguous contract.

Third, in the alternative, Shell argues that section 7.02, instead of being ambiguous, quite clearly permits the unilateral termination of its royalty obligations. At the risk of repeating ourselves, we believe the contract as a whole establishes the contrary. The judgment of the

district court that Shell remained obligated to Piamco for advance and minimum royalty payments is affirmed.

II

Shell's argument regarding the awarding of prejudgment interest is based on *Asher v. Harrington*, 461 F.2d 890 (7th Cir. 1972), wherein is stated the general rule that the filing of an appeal vests jurisdiction in the court of appeals. The district court relied on *Terket v. Lund*, 623 F.2d 29 (7th Cir. 1982), wherein this court held that the issue of entitlement to attorney's fees could be decided by the district court during the pendency of an appeal. In *Terket* we stated that the attorney's fee inquiry

> is not the sort of reconsideration of the merits which could lead to altering the substantive judgment or in any way interfere with the pending appeal. . . . Thus the policy against two courts treating the same issues concurrently does not require withdrawing the district court's power to decide attorney's fees motions while an appeal is pending.

623 F.2d at 34. We agree with the district court that *Terket* stands for the proposition that issues collateral to those on appeal, and requiring no examination of the merits of the case, may be raised in the district court after the filing of a notice of appeal. We need not define with any precision what issues may be considered collateral, but we believe that both attorney's fees and prejudgment interest are issues collateral to most appeals. The district court's award of $11,996.74 in prejudgment interest is affirmed.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISON

Assigned Judge: SUSAN GETZENDANNER
Case Number: 84 C 2569
Date: June 25, 1985
Case Title: Piamco, Inc. v. Shell Oil Company

Docket Entry:
☒ Judgment is entered as follows:

The Court grants plaintiff's motion for judgment on pleadings in full and denies the defendant's motion for summary judgment. Defendant shall pay plaintiff $171,387 under Count II. As to Count I, the Court interprets the contract as requiring defendant to pay advance and minimum royalties of $4.00 per acre regardless of whether defendant retains leases in the acreage. Issue of interest to be treated as supplemental proceedings.

JUDGMENT IN A CIVIL CASE

United States District Court

Piamco, Inc.	Northern Dist of Illinois East Division
v.	No. 84 C 2569
Shell Oil Co	Honorable Susan Getzendanner Judge

☒ Decision by Court. This action came to hearing before the Court with the judge (magistrate) named above presiding. The issues have been or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

That on Count II judgment is entered in favor of the plaintiff and against the defendant in the amount of $171,387. On Count I the Court interprets the contract as requiring defendant to pay advance and minimum royalties of $4.00 per acre regardless of whether defendant retains leases in the acreage. Enter judgment.

Clerk: H. STUART CUNNINGHAM
Deputy Clerk: Barbara J. Brotherson
Date: 6-25-85

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISON

Assigned Judge: SUSAN GETZENDANNER
Case Number: 84 C 2569
Date: September 9, 1985
Case Title: Piamco, Inc. v. Shell Oil Company

Docket Entry:
☒ Other docket entry.

Plaintiff's motion for prejudgment interest is granted. The motion for approval of the supersedeas bond is granted as sufficient to stay enforcement of Count II. Further memoranda on both motions are to be filed on September 30, October 11, and October 21, 1985 as outlined in this opinion.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISON

Assigned Judge: SUSAN GETZENDANNER
Case Number: 84 C 2569
Date: November 18, 1985
Case Title: Piamco, Inc. v. Shell Oil Company

Docket Entry:
☒ Other docket entry.

Plaintiff is awarded $ 11,996.74 in prejudgment interest on Count II of its complaint. The motion for leave to file a supplemental pleading is denied. The motion for approval of the supersedeas bond is granted in part: defendant Shell shall file an additional or substitute bond as specified in this opinion within ten days, but will not be required to post security covering future royalty payments as they become due. Enforcement of judgment on Count I is stayed until that date.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISON

Assigned Judge: SUSAN GETZENDANNER
Case Number: 84 C 2569
Date: December 5, 1985
Case Title: Piamco, Inc. v. Shell Oil Company

Docket Entry:
☒ Other docket entry.

On oral motion of the parties, the Clerk of the Court is directed to enter a Rule 58 judgment on the Order of November 18, 1985. Pre-judgment interest is entered in favor of the plaintiff and against the defendant in the amount of $ 11,996.74.

JUDGMENT IN A CIVIL CASE

United States District Court

Piamco, Inc.

v.

Shell Oil Co

Northern Dist of Illinois
East Division

No. 84 C 2569

Honorable
Susan Getzendanner
Judge

☒ Decision by Court. This action came to or hearing before the Court with the judge (magistrate) named above presiding. The issues have been or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

That on the Order of November 18, 1985, pre-judgment interest in the amount of $ 11,996.74 is entered in favor of the plaintiff and against the defendant. Enter judgment.

Clerk: H. Stuart Cunningham
Deputy Clerk: Barbara J. Brotherson
Date: 12-4-85

United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604

January 14, 1987

Before

Hon. HARLINGTON WOOD, JR., Circuit Judge
Hon. JOHN L. COFFEY, Circuit Judge
Hon. LUTHER M. SWYGERT, Senior Circuit Judge

Nos. 85-2251, 85-3207

PIAMCO, INC., an Illinois corporation,
Plaintiff-Appellee,

v.

SHELL OIL COMPANY, a Delaware corporation,
Defendant-Appellant.

Appeals from the United States District Court for the Northern District of Illinois, Eastern Division.

No. 84 C 2569

Honorable **Susan Getzendanner,** Judge Presiding.

ORDER

On consideration of the petition for rehearing and suggestion for rehearing en banc filed in the above-entitled cause by defendant-appellant, no judge in active service has requested a vote thereon, and all of the judges on the original panel have voted to deny a rehearing. Accordingly,

IT IS ORDERED that the aforesaid petition for rehearing be, and the same is hereby DENIED.

United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604

September 23, 1986

Before

Hon. LUTHER M. SWYGERT, Senior Circuit Judge

Nos. 85-2251 and 85-3207

PIAMCO, INC., an Illinois corporation,
Plaintiff-Appellee,

v.

SHELL OIL COMPANY, a Delaware corporation,
Defendant-Appellant.

Appeals from the United States District Court for the Northern District of Illinois, Eastern Division.

No. 84 C 2569

Honorable Susan Getzendanner, Judge Presiding.

This matter comes before the court for its consideration of the following documents:

1. "MOTION FOR LEAVE TO FILE PETITION FOR RECONSIDERATION IN BANC" filed herein on September 19, 1986 by counsel for the defendant-appellant.

2. "MOTION TO RECALL MANDATE AND TO STAY MANDATE PENDING RULING ON PETITION FOR REHEARING IN BANC" filed herein on September 19, 1986 by counsel for the defendant-appellant.

On consideration thereof,

IT IS ORDERED that the "MOTION FOR LEAVE TO FILE PETITION FOR RECONSIDERATION IN BANC" is GRANTED, and the clerk of this court shall file and distribute the tendered petition.

IT IS FURTHER ORDERED that the "MOTION

TO RECALL MANDATE AND TO STAY MANDATE PENDING RULING ON PETITION FOR REHEARING IN BANC" is GRANTED. The mandate issued September 12, 1986 is hereby RECALLED. Absent further order it shall be reissued seven days after disposition of the petition for rehearing, unless that petition is granted. The record shall remain in the custody of the district court clerk until further order.

United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604
September 3, 1985

Before

Hon. JOEL M. FLAUM, Circuit Judge

No. 85-2251

PIAMCO, INC., an Illinois Corporation, *Plaintiff-Appellee,* *vs.* **SHELL OIL COMPANY, A Delaware Corporation,** *Defendant-Appellant.*	Appeal from the United States District Court for the Northern District of Illinois Eastern Division No. 84 C 2569 Honorable **Susan Getzendanner** Judge Presiding

This matter comes before the court for its consideration of the following documents:

1. "MOTION TO DISMISS APPEAL" filed herein on August 13, 1985, by counsel for the plaintiff-appellee.
2. "RESPONSE IN OPPOSITION TO MOTION TO DISMISS APPEAL" filed herein on August 20, 1985, by counsel for the defendant-appellant.

On consideration thereof,

IT IS ORDERED that the MOTION TO DISMISS APPEAL is DENIED and briefing in this appeal shall proceed as follows:

1. The brief and required short appendix of the defendant-appellant will be due by September 24, 1985.

2. The brief of the plaintiff-appellee will be due by October 24, 1985.

3. The reply brief of the defendant-appellant, if any, will be due by November 7, 1985.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

PIAMCO, INC., an Illinois Corporation,
Plaintiff,

vs.

SHELL OIL COMPANY, A Delaware Corporation,
Defendant.

No. 84 C 2569

Honorable
Susan Getzendanner
District Judge Presiding

NOTICE OF APPEAL

Notice is hereby given that SHELL OIL COMPANY, defendant above named, hereby appeals to the United States Court of Appeals for the Seventh Circuit from the final judgment entered on June 25, 1985 and docketed on June 26, 1985, and asks that the District Court's Judgment on the Pleadings in favor of plaintiff be reversed and that judgment be entered granting Shell's Motion For Summary Judgment in its entirety.

Peter M. Sfikas
Attorney for Defendant,
SHELL OIL COMPANY

PETER M. SFIKAS
LARRY R. EATON
PETERSON, ROSS, SCHLOERB & SEIDEL
200 East Randolph Drive
Suite 7300
Chicago, IL 60601
(312) 861-1400

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

PIAMCO, INC., an Illinois Corporation,
Plaintiff,
v.
SHELL OIL COMPANY, A Delaware Corporation,
Defendant.

No. 84 C 2569

Honorable
Susan Getzendanner
District Judge Presiding

NOTICE OF APPEAL

Notice is hereby given that SHELL OIL COMPANY, defendant above named, hereby appeals to the United States Court of Appeals for the Seventh Circuit from the final judgment entered on December 4, 1985, and asks that the District Court's judgment in favor of plaintiff be reversed and that judgment be entered in defendant's favor.

PETER M. SFIKAS

Peter M. Sfikas
Attorney for Defendant,
SHELL OIL COMPANY

PETER M. SFIKAS
LARRY R. EATON
PETERSON, ROSS, SCHLOERB & SEIDEL
200 East Randolph Drive
Suite 7300
Chicago, Illinois 60601
(312) 861-1400

STATE OF OKLAHOMA
} SS
COUNTY OF OKLAHOMA

AFFIDAVIT

Archie J. Rubbo, being first duly sworn, does upon oath depose and state:

1. On October 24, 1974 Affiant was an employee of Shell Oil Company - Mining and is presently an employee of Shell Western E&P Inc. In that capacity, he is authorized to make this statement. If called as witness, affiant could competently atest to the matters set forth in this affidavit.

2. The Coal Reserve and Royalty Agreement dated October 24, 1974, between Piamco, Inc., and Shell Oil Company was written and prepared by employees, and/or legal counsel of Piamco, Inc.

FURTHER AFFIANT SAITH NOT.

ARCHIE J. RUBBO
Affiant

Subscribed and Sworn to
before me this 27th.
day of November, 1984.

KEITH M. ETZEL
NOTARY PUBLIC

Coal Reserve and Royalty Agreement
Dated October 24, 1974

SHELL OIL COMPANY

[EXCERPTED]

COAL RESERVE AND ROYALTY AGREEMENT

THIS COAL RESERVE AND ROYALTY AGREEMENT (Agreement) entered into as of October 24, 1974, by Piamco, Inc. (Piamco), a Delaware corporation, whose address is Suite 902, 222 S. Central Avenue, Clayton Missouri, 63105, and Shell Oil Company (Shell), a Delaware corporation whose address is Two Shell Plaza, P.O. Box 2099, Houston, Texas, 77001.

WITNESSETH:

WHEREAS, Piamco has acquired and holds coal rights, and proposes to acquire additional coal rights in a reserve located in the State of Illinois and shown on the map attached hereto as Exhibit A, the coal rights in said area whether owned by Piamco or others being hereinafter called the "reserve;" and

WHEREAS, various reports and maps relating to the Reserve has been heretofore delivered to Shell by Piamco; and

WHEREAS, Piamco has heretofore delivered to Shell a report by independent mining engineer Harry Williamson & Associates, dated October, 1974, relating to the Reserve; and

WHEREAS, the Reserve contains approximately 129,000 acres of land and is estimated to contain approximately 536 million tons of recoverable Illinois No. 5 seam coal; and

WHEREAS, Piamco desires to sell to Shell and Shell desires to purchase from Piamco, all of Piamco's right, title and interest in and to Piamco's coal rights in the Reserve, whether now owned or acquired hereafter, subject to royalties reserved to Piamco as hereinafter specified, upon the terms and conditions hereinafter set forth;

NOW, THEREFORE, in consideration of the mutual

covenants, agreements and undertakings hereinafter set forth, Piamco and Shell agree as follows:

ARTICLE I

Acquisition of Coal Rights by Shell

Section 1.01. Sale and Transfer of Coal Rights. Piamco agrees that it will sell and convey or cause to be sold and conveyed to Shell or its nominee, by an instrument or instruments substantially in the form attached hereto as Exhibit B, subject to reserved royalties as hereinafter provided, and Shell will accept and pay for all of Piamco's right, title and interest in and to the coal rights now held by Piamco in the Reserve, whether such rights are held or acquired by Piamco or its wholly owned subsidiary Sangamon County Land Company, an Illinois corporation whose address is the same as the address of Piamco shown above (Sangamon County Land Company being hereinafter referred to as Sangamon Company), consisting of coal leases on approximately 5,228 acres located in the Reserve. Assignment and transfers of such leases and instruments shall be made within 30 days after execution of this Agreement. Upon delivery to Shell of such leases and instruments, together with opinions of counsel or other existing evidence relating to the title of the lessors, now in possession of Piamco, Shell shall have 30 days in which to accept such assignments and transfers and assume all obligations Piamco or its employees or subsidiary as the original lessee under such leases. Shell may return any such lease and assignment if a valid objection to lessor's title or right to make such lease is found. In the event of any such return, Piamco shall within the Acquisition Period and at its own expense either cure such objection or obtain, assign and transfer to Shell a lease or leases on an approximately equivalent number of acres within the Reserve and Shell shall accept such assignment and transfer and assume the obligations of Piamco or its employees or subsidiary under such lease or leases.

Section 1.02. Purchase Price. The purchase price to be paid by Shell to Piamco for the coal rights conveyed to Shell pursuant to Section 1.01 shall be $467,000 payable in cash upon transfer of the coal rights, plus

(a) advance and minimum royalties as provided in Article II hereof; plus

(b) earned royalties as provided in Article III hereof.

Section 1.03. Additional Coal Rights. Piamco agrees that it will use its best efforts to acquire and transfer to Shell, or it nominee, within a period of 15 month after the date of this Agreement (such period being hereafter called the "Acquisition Period"), 59,772 additional acres within the Reserve. The 59,772 acres to be acquired by Piamco is not a limitation and any additional acres acquired by Piamco within the Reserve during the Acquisition Period shall be transferred to Shell. Coal leases acquired by Piamco during the Acquisition Period but not transferred because of title objections may be transferred upon elimination of such objections within one year after the Acquisition Period. During the Acquisition Period, Piamco will use its best efforts to acquire within the Reserve at least one block of contiguous leases suitable for development of a mine. Any such block shall contain approximately 12,000 acres or approximately 100,000,000 tons of coal in place. Any such block may include parcels of non-acquired coal rights that do not prevent mining of the block or with respect to which it is reasonably expected that such parcels can be acquired on or before the time required for mining the block.

Piamco shall make such acquisitions using its own employees, land agents, professional personnel and consultants as it may deem necessary or appropriate for the purpose and Shell shall have no responsibility whatsoever for the selection, control, supervision or payment of such employees, agents, personnel and consultants or for their acts. In carrying out its obligations pursuant to this

Section 1.03, Piamco shall have the right to conduct its activities in its own name or to act through Sangamon Company or any other of its wholly owned subsidiaries or agents provided, however, that at all times and in all respects Piamco shall be solely responsible for any activity conducted through Sangamon Company or any such subsidiary or agents.

Piamco shall defend, indemnify and save Shell harmless from all claims, demands, damages costs, expenses, liabilities or suits (i) by or on behalf of Piamco's employees or (ii) by others resulting from any claimed negligent act or omission of Piamco, its subsidiaries, employees, agents or contractors.

Section 1.04. Payments to Piamco. Shell agrees that it will pay Piamco for making the acquisitions and transfers provided for in the foregoing Section 1.03:

(a) $9.00 per acre for administrative, engineering, and supervisory services; plus

(b) The actual per acre cost to Piamco for payments made to landowners as initial payments under leases of coal rights acquired and transferred to Shell pursuant to this Agreement (which per acre cost shall not exceed an average of $20.00 per acre unless a higher average cost shall be approved by Shell); plus

(c) Upon submission by Piamco of a statement thereof in such reasonable detail as Shell shall require, the actual cost to Piamco or its subsidiaries or agents incurred in making acquisitions pursuant to Section 1.03. Shell shall have the right at all reasonable times to examine the books and records of Piamco or such subsidiaries or agents to the extent necessary to verify the accuracy of any such statement. Actual cost shall include salaries and working expenses of land agents, title agents, secretaries and clerks; the cost of office space for such personnel on the premises of Sangamon County Land Company at Springfield, Illinois; the cost of office equipment, materials, and supplies; and legal, professional and other fees and expenses. Salaries of officers of Piamco and employees of Piamco, Inc at its

offices in Clayton, Missouri and other overhead costs and expenses of Piamco shall not be included in the actual cost to Piamco referred to in this paragraph (c).

In addition, Shell agrees that it will pay to Piamco for all coal rights transferred to Shell pursuant to this Section 1.03:

(i) an advance and minimum royalty as provided in Article II hereof; and

(ii) earned royalties as provided in Article III hereof.

Section 1.05. Leases and Coal Rights. Coal rights shall be acquired in the Reserve by Piamco by obtaining coal leases from the owners of the coal. Such coal leases shall be generally in the form attached hereto as Exhibit C with such changes therein as shall be required from time to time by changing economic or competitive conditions in the Reserve area or to meet or satisfy demands of landowners arising in the course of negotiating the coal leases, provided, however, that no such change shall impose an undue burden on the lessee or shall restrict or inhibit the mining of the coal which is the subject of the lease or the mining operations of the lessee. Piamco shall have the right, exerciseable in its discretion, to make any such change to any future or existing leases without prior approval of Shell, but subject to any prior instructions of Shell.

(a) If Piamco shall be uncertain as to whether any proposed change in said form shall result in an undue burden on the lessee or shall restrict or inhibit the mining of the coal which is the subject of the lease or the mining operations of lessee or otherwise render the lease unsatisfactory or unacceptable to Shell, Piamco may submit said changed form to Shell for its consideration and Shell shall have a period of seven working days in which to accept or reject the same. In the event that Shell shall not accept or reject the changed form in said period, the changed form shall be deemed acceptable to Shell for the purposes of this agreement. If within the period of seven working

Section 1.03, Piamco shall have the right to conduct its activities in its own name or to act through Sangamon Company or any other of its wholly owned subsidiaries or agents provided, however, that at all times and in all respects Piamco shall be solely responsible for any activity conducted through Sangamon Company or any such subsidiary or agents.

Piamco shall defend, indemnify and save Shell harmless from all claims, demands, damages costs, expenses, liabilities or suits (i) by or on behalf of Piamco's employees or (ii) by others resulting from any claimed negligent act or omission of Piamco, its subsidiaries, employees, agents or contractors.

Section 1.04. Payments to Piamco. Shell agrees that it will pay Piamco for making the acquisitions and transfers provided for in the foregoing Section 1.03:

(a) $9.00 per acre for administrative, engineering, and supervisory services; plus

(b) The actual per acre cost to Piamco for payments made to landowners as initial payments under leases of coal rights acquired and transferred to Shell pursuant to this Agreement (which per acre cost shall not exceed an average of $20.00 per acre unless a higher average cost shall be approved by Shell); plus

(c) Upon submission by Piamco of a statement thereof in such reasonable detail as Shell shall require, the actual cost to Piamco or its subsidiaries or agents incurred in making acquisitions pursuant to Section 1.03. Shell shall have the right at all reasonable times to examine the books and records of Piamco or such subsidiaries or agents to the extent necessary to verify the accuracy of any such statement. Actual cost shall include salaries and working expenses of land agents, title agents, secretaries and clerks; the cost of office space for such personnel on the premises of Sangamon County Land Company at Springfield, Illinois; the cost of office equipment, materials, and supplies; and legal, professional and other fees and expenses. Salaries of officers of Piamco and employees of Piamco, Inc at its

offices in Clayton, Missouri and other overhead costs and expenses of Piamco shall not be included in the actual cost to Piamco referred to in this paragraph (c).

In addition, Shell agrees that it will pay to Piamco for all coal rights transferred to Shell pursuant to this Section 1.03:

(i) an advance and minimum royalty as provided in Article II hereof; and

(ii) earned royalties as provided in Article III hereof.

Section 1.05. Leases and Coal Rights. Coal rights shall be acquired in the Reserve by Piamco by obtaining coal leases from the owners of the coal. Such coal leases shall be generally in the form attached hereto as Exhibit C with such changes therein as shall be required from time to time by changing economic or competitive conditions in the Reserve area or to meet or satisfy demands of landowners arising in the course of negotiating the coal leases, provided, however, that no such change shall impose an undue burden on the lessee or shall restrict or inhibit the mining of the coal which is the subject of the lease or the mining operations of the lessee. Piamco shall have the right, exerciseable in its discretion, to make any such change to any future or existing leases without prior approval of Shell, but subject to any prior instructions of Shell.

(a) If Piamco shall be uncertain as to whether any proposed change in said form shall result in an undue burden on the lessee or shall restrict or inhibit the mining of the coal which is the subject of the lease or the mining operations of lessee or otherwise render the lease unsatisfactory or unacceptable to Shell, Piamco may submit said changed form to Shell for its consideration and Shell shall have a period of seven working days in which to accept or reject the same. In the event that Shell shall not accept or reject the changed form in said period, the changed form shall be deemed acceptable to Shell for the purposes of this agreement. If within the period of seven working

days Shell shall reject the changed form, Shell will cooperate with Piamco in the formulation of revised lease provisions acceptable to Shell which will meet or satisfy the demands of landowners.

(b) Piamco agrees that without the consent of Shell no coal lease obtained by it in the Reserve shall provide for a minimum and advance royalty, after the initial payment in excess of $4.00 per acre per year or an earned royalty in excess of $00.40 per ton for coal used (escalated as provided in the lease form attached hereto as Exhibit or 4% of the average sale price per ton of coal mined under the terms of such lease.

(c) Piamco at all times shall keep Shell advised of changing economic or competitive conditions in the Reserve area and, if required by any such changing conditions, Shell will cooperate with Piamco in revising or changing the lease form, so as to meet such changing conditions.

Section 1.06. Title and Recording. Piamco shall use reasonable care to insure that all leases obtained and transferred to Shell pursuant to this Agreement are in proper form and duly executed by the owners of the coal rights included therein. For the purposes of this Section 1.06, coal underlying the surface of any property will be deemed to be owned by the surface owner unless the document of record conveying ownership of the surface to the current owner shows that the coal has been severed. Notwithstanding the undertakings of Piamco set forth in this Section 1.06, Piamco shall not be deemed, for the purposes of this Agreement or otherwise, to be a guarantor of title or of the right of the owner of the coal to make or enter into any coal lease acquired by Piamco pursuant to this Agreement. Any and all leases acquired by Piamco in the Reserve pursuant to this Agreement may be recorded in the name of Piamco or its agent or designee at such times and in such places and manner as Piamco shall deem necessary and appropriate to protect the rights of the lessee against subsequent or intervening claims. So long as this

Agreement shall be in full force and effect Piamco shall not assign, pledge, or encumber nor permit its agent or designee to assign, pledge or encumber any lease obtained by Piamco pursuant to this Agreement except for assignments to Shell as hereinafter provided. Piamco will take all necessary action, including payments to landowners, as may be required to keep all of said leases in full force and effect prior to the time Shell shall become obligated to make such payments as hereinafter provided.

Section 1.07. Transfer of Leases to Shell. As frequently as Piamco shall determine but at least by the tenth day of each calendar month of the Acquisition Period and thereafter to the extent permitted by Section 1.03 hereof, Piamco shall assign and transfer to Shell or its nominee as directed by Shell, by instrument in the form attached hereto as Exhibit B, or in such other form or with such modifications thereof as shall be requested by Shell in order to permit proper recording thereof, all coal leases obtained by Piamco for Shell during the preceding calendar month or period. Upon delivery to Shell of such leases and instruments, Shell or its nominee shall accept such assignment and transfer and assume all obligations of Piamco or its employees or its subsidiary as the original lessee under the lease. In exercising its right to designate a nominee as transferee of the coal leases, Shell agrees that it will designate a nominee which is financially able to carry out the obligations of the lessee thereunder.

ARTICLE II

Advance and Minimum Royalties

It is understood and agreed that Piamco reserves and retains and is entitled to advance and minimum royalties *on rights acquired by Shell in the Reserve* pursuant to Article I of this Agreement, at the rate of $4.00 per acre per year for a period of 15 years commencing on the last day of the month following the Acquisition Period. For leases transferred to Shell pursuant to the provisions of Section

1.03 after the Acquisition Period, advance and minimum royalties for such leases shall begin on the last day of the month following such transfer. The obligation of Shell to pay such royalties shall by [sic] subject to the provisions of Section 7.01 hereof.

ARTICLE III

Earned Royalties

Section 3.01. Earned Royalties of Piamco. It is understood and agreed that Piamco is entitled to an earned royalty of $00.05 per ton of coal mined and removed and sold or used from the Reserve at any time before or after expiration or termination of this Agreement under coal rights heretofore or hereafter obtained by Shell from Piamco or from others or acquired by Shell or others acting on behalf of Shell, in the Reserve.

Section 3.02. Escalation of Earned Royalty. The earned royalty rate of $00.05 per ton shall be adjusted to reflect increases or decreases in the arithmetic average, for each calendar quarter, of the "Wholesale Price Index - All Commodities" issued monthly by the United States Department of Labor, Bureau of Labor Statistics, for each of the three months in the quarter. (The Index base 1967 equals 100.) The arithmetic average for the third calendar quarter of 1974 shall be the base index. The royalty rate of $00.05 per ton shall be adjusted by multiplying it by an adjustment factor equal to the latest quarterly average, rounded to the nearest one-hundredth point, divided by the base index. Increases or decreases shall be rounded to the nearest one-hundredth of a cent, or to the closest even one-hundreth if there is no nearest one-hundredth. Adjustments to the royalty rate resulting from changes in the quarterly average shall apply to tonnage delivered in the calendar quarter following the quarter for which the adjustment has been computed.

In the event the Department of Labor should discontinue issuing or materially change the principal com-

ponents of the index referred to above, the parties shall agree on another publication or index as a substitute therefor or upon the application of the revised Index, as the case may be. In the event the parties are unable to agree after attempting for twenty days to reach such agreement, such other publications or index as a substitute therefor or application of the revised Index, as the case may be, shall be determined by arbitration. Each of the parties shall choose one arbitrator and such two arbitrators shall choose a third. The arbitrators shall be experienced responsible financial parties in Chicago, Illinois. They shall be directed to render a report in writing within 20 days signed by each of them. The expenses of arbitration shall be borne equally by the parties and the report of the arbitrators shall be binding upon both parties.

The minimum royalty rate resulting from any of the Index changes shall be $00.05 per ton.

Section 3.03. Credits for Advance and Minimum Royalties. Any cumulative excess of total minimum and advance royalties paid pursuant to Article II over total earned royalties payable pursuant to Section 3.01 of this Article III shall be credited against subsequent earned royalties payable under said Section 3.01.

ARTICLE IV

Protection of Advance and Minimum and Earned Royalties

The obligation to pay advance and minimum and earned royalties as provided in Articles II and III of this Agreement shall operate both as an obligation of Shell and as a covenant running with the land and Shell agrees that it will not sell, assign, transfer or convey the Reserve or any portion thereof to any person, firm or corporation whatsoever other than Piamco except upon an agreement that such purchaser, assignee, or transferee agrees for itself, its successors and assigns, to pay to Piamco the advance and minimum and earned royalties provided for herein,

and that Shell will not sell, assign, transfer or convey the Reserve or any portion thereof except to a purchaser, assignee or transferee that is reasonably financially able to carry out its obligation to pay such advance and minimum and earned royalties.

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ARTICLE VII

Minimum Reserve

Section 7.01. Failure to Acquire Minimum Reserve. In the event that Piamco shall fail to acquire and transfer to Shell within the Acquisition Period coal leases in the Reserve, pursuant to Section 1.01 and 1.03, totaling at least 50,000 acres, then

(a) Within a period of 30 days following expiration of the Acquisition Period Shell shall elect either (i) to terminate this Agreement and, subject to paragraph (b) of this Section 7.01, all coal leases theretofore transferred to Shell by Piamco pursuant to this Agreement or (ii) to continue this Agreement in full force and effect and to retain all such coal leases.

(b) In the event Shell shall elect within such 30 day period to terminate this Agreement it shall notify Piamco in writing of such election and offer to reconvey and transfer to Piamco without cost all coal leases then held by Shell, theretofore obtained from Piamco pursuant to this Agreement, upon the assumption by Piamco of all obligations as lessee thereunder. Piamco shall elect within 10 days after receipt of such notice from Shell either to accept such offer or reconveyance and transfer of said leases or to reject said offer. If Piamco shall elect to accept such offer, then Shell shall within a reasonable time reconvey, transfer and assign all such leases to Piamco by appropriate and effective legal instruments and thereupon Shell shall have no further obligation to Piamco for the payment

of advance, minimum or earned royalties pursuant to this Agreement. if Piamco shall reject such offer, Shell shall terminate all such leases forthwith in accordance with the terms thereof and shall have no further obligation to Piamco for the payment of advance and minimum or earned royalties pursuant to this Agreement. Upon any such reconveyance, transfer or assignment to Piamco or the rejection of any such offer by Piamco, this Agreement shall terminate upon the payment to Piamco of any amounts owed to Piamco by Shell pursuant to the terms of this Agreement and not paid prior to the date of such termination.

(c) In the even that Shell shall fail to make any election during such 30 day period or shall elect to retain all coal leases theretofore transferred to it by Piamco, by giving written notice of such election to Piamco, then Piamco shall be released from any obligation to acquire additional coal rights for Shell, but all other terms and provisions of this Agreement, including the obligation of Shell to pay advance and minimum and earned royalties shall remain in full force and effect.

Acreage included in coal leases acquired by Piamco during the Acquisition Period but not transferred to Shell during the Acquisition Period because they are subject to the elimination or curing of title exceptions, defects, and objections shall, for the purpose of this Section 7.01, be deemed to have been acquired and transferred to Shell pursuant to Section 1.03 if, in the opinion of reputable counsel, such exceptions, defects and objections can be eliminated or cured within one year after the Acquisition Period.

Section 7.02. Shell to Maintain Leases. Shell agrees that during Acquisition Period plus a period of 30 days, it will use its best efforts to maintain the leases acquired from Piamco pursuant to this Agreement and keep the same in full force and effect and make timely payment of all money obligations required thereby. Shell shall have

the right after the Acquisition Period to sell, assign, transfer or convey such leases subject to the provisions of Article IV. After the Acquisition Period Shell shall have the right to terminate any lease provided, however, that if Shell shall terminate all or substantially all of such leases it shall first offer to assign, transfer and convey the same to Piamco without cost to Piamco.

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